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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 723

SHELDON WHEELER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 724

WILLIAM MCGOWAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 260-268; Mc.Pet. App. 1-8; W.Pet. App. 1-8) [1] is reported at 219 F. 2d 773.

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[1] The designations "Mc.Pet." and "W.Pet." refer to the petitions for writs of certiorari in McGowan, No. 724, and Wheeler, No. 723, cases, respectively.

JURISDICTION

The judgments of the Court of Appeals were entered on January 25, 1955 (R. 269, 270) and the petitions for rehearings were denied on March 16, 1955 (R. 271). The petitions for writs of certiorari were filed on April 15, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In Nos. 723 and 724:

1. Whether the trial judge's remarks deprived petitioners of a fair trial.

In No. 723:

2. Whether the trial court abused its discretion in limiting cross-examination of witnesses.

STATEMENT

Petitioners were both convicted under an indictment which charged violations of the National Motor Vehicle Theft Act (18 U.S.C. 2312) and a conspiracy to violate said Act (R. 5-9, 235, 236). Each of the petitioners was sentenced generally to a term of imprisonment for five years and to a fine of $5,000 (R. 237-239). On appeal, the judgments were affirmed (R. 269, 270).

The evidence in support of the verdict may be summarized as follows:

On September 20, 1950, a 1950 Chrysler was stolen from its owner in Chicago (R. 33-34); on November 5, 1950, a 1950 Pontiac (R. 19-20); and

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[2] This testimony as to when the 1950 De Soto was stolen must be either typographical error or an error in the testimony, since it is clear from other government testimony that

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on November 15, 1950,[2] a 1950 De Soto (R. 23-24), were stolen from owners in Chicago.

During 1950, petitioner Wheeler was engaged in the used car business in Chicago under the name of Shelley Auto Company. The business was managed by petitioner McGowan on a commission basis. (R. 151-152.)

In August, 1950, at an auction in Iowa, McGowan, acting for Shelley Auto Company, met Orville O. Millenacker, a car dealer from Austin, Minnesota, and sold him a De Soto, which was later identified by its secret number, as being the stolen car (R. 41-42, 55-57, 76).[3] McGowan gave Millenacker an Iowa title issued to one Raymond Looney (R. 57-58). A Wisconsin application for title to the car was purportedly signed by Looney as owner, and by Bryden Motors, through Fred Martin as dealer, but that company never sold such car and had no one by the name of Fred Martin in its employ (R. 53).

In October, 1950, McGowan drove to Minnesota and sold to Millenacker a 1950 Chrysler, subsequently identified as a stolen car (R. 28, 60-61). The certificate of title was an Iowa one, purport-

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this car was the identical car sold by McGowan in August, 1950. See fn. 3. However, petitioner received a general sentence upon three counts, each of which supports the sentence which was imposed.

[3] Each of the cars when recovered had the original public motor numbers obliterated by filing and other numbers stamped in lieu thereof. Identification was possible only through secret motor numbers (R. 27-29, 35-36, 41-43) placed on the car in a secret place which is known only to the auto manufacturer, the FBI, and the National Motor Vehicle Theft Bureau (R. 27, 28).

edly issued to Donald Carter (R. 62). A Wisconsin registration of such car was purportedly signed by Carter as purchaser and B. and J. Motors, as dealer, but the latter company had never sold such car (R. 46-47).

A few weeks later, McGowan drove to Minnesota and sold to Millenacker the stolen 1950 Pontiac (R. 63-64, 35-37). The certificate of title was an Illinois one in the name of Arnold Reeves (R. 66, 123-124). A Wisconsin application for the title was purportedly signed by one Joseph Minor as purchaser and Bladon Motors as dealer-seller, but Bladon Motors never sold a car of that description to anyone, nor did it sign the application (R. 51-52). Subsequently the title was purportedly transferred from Minor to Reeves (R. 168).

In each case, Mr. Millenacker paid for the car in whole or in part by a check made payable to Shelley Auto Company (R. 58, 61, 64). He sold the cars in the ordinary course of business (R. 66, 73-74).

McGowan, when questioned by the Chicago police, and Wheeler, in testifying at the trial, said that the three cars in question were purchased by McGowan for the company with cash obtained from Wheeler from the persons named in the certificates of title given to Mr. Millenacker, when each such person, then unknown to them, drove up to the company's place of business and arranged the sale (R. 127-128, 129, 152-153, 159, 166-168). Wheeler, when questioned by the police, produced a police book in which each car dealer is required to keep a record of all the cars handled by him. It con-

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tained no entries relating to the cars in question. (R. 126-127.) At the trial, Wheeler testified that the company had received bills of sale for the cars but that the police had not asked him for these records (R. 173). This testimony was contrary to government testimony that, when questioned by the police, Wheeler had said he had no records relating to the company's purchase of the three cars (R. 123). Wheeler testified that these records were destroyed in a fire on the company's premises before trial (R. 174). Wheeler, when questioned by the police, admitted that he signed his sister's name as notary and used her seal on the application for an Illinois title purportedly signed by Arnold Reeves, but in his testimony he denied doing so (R. 162).

ARGUMENT

1. Petitioners argue (Mc.Pet. 10-17; W.Pet. 12-20) that, inasmuch as the court below was critical of some of the trial judge's remarks (see W.Pet. App. 7, 8), it misapplied the harmless error doctrine in affirming the convictions. The court below, however, showed keen awareness of the fact that remarks of a trial judge may have great weight with the jury. Its ruling that, nevertheless, in this case the few remarks which it regarded as improper did not warrant reversal, is an exercise of judgment with respect to the particular facts of this case which is amply justified by the record and which does not call for review by this Court.

A mere reading of most of the incidents cited by petitioner shows that they are indeed attempts to

magnify on appeal instances which were of little importance in their setting. *Glasser* v. *United States*, 315 U.S. 60, 83. Petitioner McGowan cites, as an example of prejudice, a warning by the trial judge that, if his counsel continued a line of questioning, he might get answers which would be prejudicial to his client since the witness might have hearsay knowledge obtained from his insurance company (R. 26, see Mc. Pet. 6-7). Equally without basis is the criticism (Mc.Pet. 8-9; W.Pet. 8-9) of the colloquy which followed government counsel's statement that he intended to offer certain photographs in evidence, but did not have the photographer present. The court, in order to be able to rule on anticipated objections, asked whether the photographer could testify only to the fact that the pictures were accurate representations of the cars in question (R. 138-139). There was certainly nothing improper in such question. Equally captious is the criticism of the judge's remarks (Mc.Pet. 7; W.Pet. 11) after the government expert had demurred to answering a question as to the location of the secret number. When Wheeler's attorney said he was not interested in the particular location, the judge quite naturally said he did not want "to waste time getting information your own men are not interested in" (R. 44). The other incidents cited by Wheeler, beyond those mentioned by the Court of Appeals which are discussed below, are equally inconsequential (W.-Pet. 11, 12; R. 103, 121).

The Court of Appeals mentioned (W. Pet. App. 6) the statement by the trial court in sustaining

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an objection that the question "is the sort of thing you did not want to go into, Mr. Berkson. If you want to keep it brief, we will keep it brief for you. We will narrow the issues" (R. 25). This related to the first question asked by a defense counsel on cross-examination just after the court had sustained an objection to a question asked by the government counsel on the ground that it was immaterial, the court ruling that the only issue to which the witnesses' testimony was addressed was whether his car had been stolen (R. 26). The court was apparently referring back to defense counsel's preceding efforts to limit the issues.

A remark criticized by the Court of Appeals was the statement of the trial judge, during cross-examination of Millenacker, that he had been anticipating an objection (R. 93). This was to defense counsel's reading of questions and answers put to Millenacker in the office of defense counsel prior to trial (R. 93). Actually, government counsel had previously objected to "counsel reading any testimony of some so-called deposition which we don't know about" (R. 92), and the judge had ruled that he did not then know whether the answers had anything to do with the case (R. 92). The statement that the objection was anticipated was therefore not wholly unfounded. Moreover, the court thereafter permitted questioning along the same line for some time before again sustaining an objection (R. 94-95).

The other incident which the Court of Appeals found improper was the fact that, during Wheeler's cross-examination, when counsel for McGowan

stated that Wheeler had already answered a question, the judge asked whom the attorney represented (R. 199-200). Coming so late in the trial, this question may, as petitioners argue, have had a touch of irony, but certainly that single incident, which Wheeler's counsel noted before the jury with at least equal irony (see R. 200), cannot be said to have deprived petitioners of a fair trial.

A reading of the record as a whole suggests that the Court of Appeals did not err in upholding the convictions despite these few incidents. The record as a whole shows very little comment by the judge. Petitioners were apparently satisfied with his charge since they did not have it transcribed in the record and do not raise any issue with respect thereto. The general conduct of the judge was well within the bounds of permissible discretion. Cf. *United States* v. *Giallo,* 206 F. 2d 207 (C. A. 2), affirmed *per curiam,* 346 U. S. 929; *Glasser* v. *United States,* 315 U. S. 60, 82; *Todorow* v. *United States,* 173 F. 2d 439 (C. A. 9), certiorari denied, 337 U. S. 925; *United States* v. *Domres,* 142 F. 2d 477 (C. A. 7); *United States* v. *Warren,* 120 F. 2d 211, 212 (C. A. 2); *Goldstein* v. *United States,* 63 F. 2d 609, 613 (C. A. 8).

2. Petitioner Wheeler argues (Pet. 24-30) that the trial court abused its discretion in limiting the cross-examination of Millenacker with respect to statements he had made to defense counsel before trial (R. 95-96, 99, 102, 118-120). The trial court did, however, permit extensive questioning on the basis of such statement (R. 94-95, 98, 99, 102-103, 118-120), stating that he would rule only on spe-

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cific questions, not on the statement as a whole (R. 99, 100, 101). The judge sustained objections to particular questions on the ground that the prior answers given were not in fact impeaching (R. 99, 102-120). There was thus no undue limitation of cross-examination. The present attempt of petitioner's counsel to show some tenuous basis on which the answers could be said to be contradictory to prior testimony (Pet. 24-27) discloses the insignificant nature of his objections.

A police officer had testified to conversations with petitioner Wheeler on January 5 and 9, 1951 (R. 122-130). On cross-examination, he was asked whether he had talked with Wheeler before and after those dates. Objection was sustained on the ground that this was beyond the scope of direct examination. (R. 132, 136.) Serious protest was made only to the exclusion of the question on later contact (R. 136). The court apparently ruled that if petitioner wanted to use the officer as his own witness he could do so (R. 136).

Since the police officer was of course testifying to admissions against interest by a defendant, it was within the trial court's discretion to limit the cross-examination to the particular explanations by petitioner which were the subject of direct examination. The limitation of cross-examination is within the trial judge's discretion, and its exercise here was not an abuse of discretion. See *Glasser* v. *United States, supra; Summit Drilling Corp.* v. *Commissioner of Internal Revenue,* 160 F. 2d 703 (C.A. 10); *United States* v. *Lawinski,* 195 F.2d 1 (C.A. 7).

Moreover, Wheeler took the stand in his own behalf and made clear the object of the excluded question as to meetings between the officer and Wheeler after January 9 (R. 163). Wheeler testified that he next saw the officer at the time he was arrested and taken before a commissioner, and that later the case against him was dismissed before the commissioner (R. 164-166). It is thus clear that petitioner's attempted cross-examination of the officer had nothing to do with the subject of the officer's direct testimony.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

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